005-42K-S1 (4) (6)

Nos. 08-240 and 08-372

Supreme Ct., U.S.
FILED
AUG 21 2009

IN THE

Supreme Court of the United States

MAC'S SHELL SERVICE, INC., *ET AL.*,
Petitioners,

v.

SHELL OIL PRODUCTS COMPANY LLC, *ET AL.*,
Respondents.

SHELL OIL PRODUCTS COMPANY LLC, *ET AL.*,
Petitioners,

v.

MAC'S SHELL SERVICE, INC., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR SHELL OIL PRODUCTS COMPANY LLC, MOTIVA ENTERPRISES LLC, AND SHELL OIL COMPANY

PAUL D. SANSON
VAUGHAN FINN
KAREN T. STAIB
SHIPMAN & GOODWIN LLP
One Constitution Plaza
Hartford, CT 06103
(860) 251-5000

JAMES COWAN
SENIOR COUNSEL
SHELL OIL COMPANY
P.O. Box 2463
Houston, TX 77252-2463
(713) 241-4039

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

MACEY REASONER STOKES
DAVID M. RODI
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995
(713) 229-1234

Counsel for Shell Oil Products Company LLC, et al.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

3724 97

QUESTIONS PRESENTED

The Petroleum Marketing Practices Act, 15 U.S.C. §§2801 *et seq.*, regulates the circumstances in which a petroleum refiner or wholesaler can "terminate" a service-station franchise or "fail to renew" a franchise relationship. In this case, several Massachusetts service-station dealers claimed that they had been "constructively terminated" in violation of the Act, even though they continued to operate their franchises (indeed, many were still operating at the time of trial, almost five years after they claim to have been "constructively terminated"). Similarly, the dealers claimed that they had been "constructively non-renewed" in violation of the Act, even though they were offered and signed renewal agreements. The questions presented are:

1. Whether a service-station dealer that continues to operate its franchise—using the same trademark, selling the same fuel, and occupying the same premises—can bring an action claiming that it was "constructively terminated" in violation of the Act. (No. 08-372)

2. Whether a service-station dealer that is offered and signs a renewal agreement can bring an action claiming that it was "constructively non-renewed" in violation of the Act. (No. 08-240)

PARTIES TO THE PROCEEDINGS BELOW

Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company were defendants in the district court and appellants in the court of appeals.

Mac's Shell Service, Inc., Cynthia Karol, John A. Sullivan, Akmal, Inc., Sid Prashad, RAM Corporation, Inc., J&M Avramidis, Inc., and Stephen Pisarczyk were plaintiffs in the district court and appellees in the court of appeals. Three K's, Inc., was a plaintiff in the district court, was an appellee in the court of appeals, and is a respondent in this Court under this Court's Rule 12.6.

Francis Marcoux, Abraham Abraham, Jordan Avramidis, Chriss Azazian, Richard Baima, Ed Baker, Steve Black, James Coggeshall, Michael Corbett, Patricia Dasilva, Alex Dasilva, Steve Falcone, George Fontaine, Bill Fontaine, Camille Francis, Matty Gaeta, Donald Gagnon, John Generoso, Kal Hamze, Abraham Hamze, Tibor Hangyal, Adam Hipp, Abdul Kafal, George Kantarges, Jim Kantarowski, William Kaufman, Joe Kelleher, Hussein Kobessi, Mike Lamarche, Richard Melanson, Akmal Moawed, Constantin Peides, Harvey Rudnick, Roger Thibault, Dimitrious Tsanikilides, Stephen Shea, J. Enterprise, Inc., Nikolas Manousaridis, Paul Sroczynski, JES Service, Inc., Ronnie Aboud, Mahendrs Amin, Massoud Atalish, Mike Atalish, Douglas Chapman, Steve Frangias, John Golden, Kal Hamze, Patrick Hines, Muhammad Imatiaz, Jay Jon, Kay Jon, Jaque Kanaan, James Moraidis, Sunny Patel, Russell Picard, Paul Richards, Fred Saad, Aziz Saba, Walid Samrout, Earl Stickney, Thomas Sullivan, Toufic Atallah, Dror Dusdushman, Earl McLaughlin, Wilson Tiburtino, Lasco Enterprises, Inc., and Larry Rubensein were plaintiffs in the district court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company state as follows:

1. Shell Oil Company (erroneously sued as "Shell Oil Company, Inc.") is a Delaware corporation and a wholly owned subsidiary of Shell Petroleum, Inc. Shell Petroleum, Inc. is a Delaware corporation, the shares of which are owned directly or indirectly by Shell Petroleum N.V. Shell Petroleum N.V. was founded under the laws of the Netherlands. The shares of Shell Petroleum N.V. are owned 100% by Royal Dutch Shell plc, a publicly traded company. Royal Dutch Shell plc is the ultimate parent company of the companies which comprise the Shell Group.

2. Motiva Enterprises LLC is a Delaware limited liability company in which Shell Oil Company and Saudi Refining Inc. respectively own directly or indirectly 50% of the ownership interests. The ultimate parent company of Saudi Refining Inc. is the Saudi Arabian Oil Company ("Saudi Aramco"). Saudi Refining Inc. and Saudi Aramco are not publicly traded companies.

3. Shell Oil Products Company was formed as a Delaware corporation wholly owned by Shell Oil Company. On April 1, 2001, Shell Oil Products Company converted to a Delaware limited liability company now known as Shell Oil Products Company LLC. Shell Oil Products Company LLC is wholly owned by Shell Oil Company.

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BRIEF FOR SHELL OIL PRODUCTS COMPANY LLC, MOTIVA ENTERPRISES LLC, AND SHELL OIL COMPANY

DECISIONS BELOW

The opinion of the court of appeals (J.A. 429-462) is published at 524 F.3d 33 (1st Cir. 2008). The order and judgment of the district court (J.A. 400-425) are unreported.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on April 18, 2008, and denied rehearing and rehearing en banc on May 23, 2008 (J.A. 463-464). The petition in No. 08-240 was filed on August 21, 2008. On August 14, 2008, Justice Souter extended the time to file the petition in No. 08-372 to and including September 20, 2008, and that petition was filed on September 19, 2008. This Court granted both petitions on June 15, 2009. The Court has jurisdiction under 28 U.S.C. §1254(1).[1]

STATUTORY PROVISIONS INVOLVED

Title I of the Petroleum Marketing Practices Act, 15 U.S.C. §§2801-2807, is set forth in an appendix to this brief (App., *infra*, 1a-28a).

STATEMENT

The Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§2801 *et seq.*, regulates the circumstances in which a petroleum refiner or wholesaler can "terminate" a service-station franchise or "fail to renew" a franchise relationship. These consolidated cases present two related questions. The question in No. 08-372 is whether a service-station franchisee can claim it was "terminate[d]" within the meaning of the PMPA when, in fact, it continues to operate its franchise. The question in No. 08-240 is whether a service-station franchisee can claim that the franchisor "fail[ed] to renew" the franchise relationship within the meaning of the PMPA when, in fact, the franchisee signed a renewal agreement. The court of appeals answered the first question in the affirmative, holding that a franchisee can claim to have been terminated even

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[1] Pursuant to this Court's order of July 27, 2009, Shell and Motiva are filing as if they were petitioners in both cases even though they prevailed in No. 08-240.

if it continues to operate. Indeed, half the plaintiffs in this case were still operating their franchises at the time of trial, almost five years after their alleged "termination." The court of appeals answered the second question in the negative, holding that a franchisee that signs a renewal agreement cannot claim the franchisor failed to renew the franchise relationship.

I. STATUTORY FRAMEWORK

Petroleum refiners and wholesalers provide motor fuel to the public through service stations that are often operated by independent retailers (frequently called "dealers"). A petroleum franchise agreement between the supplier and dealer typically authorizes the dealer to use a refiner's trademark, provides for the supply of fuel, and may include a lease of the premises. See S. Rep. No. 95-731, at 17 (1978); H.R. Rep. No. 95-161, at 14 (1977). Franchise agreements ordinarily have a specified term (*e.g.*, three years) after which they automatically expire. See, *e.g.*, J.A. 268. The parties can "renew" the relationship at the end of that term by executing a new agreement. See S. Rep. No. 95-731, at 18.

In the 1970s, Congress received "numerous complaints by franchisees of unfair terminations or non-renewals of their franchises." S. Rep. No. 95-731, at 17; H.R. Rep. No. 95-161, at 14. Congress responded in 1978 by enacting the PMPA. Rather than regulate all aspects of the franchise relationship, Congress focused on the two areas that had prompted complaint by "defin[ing] the rights and obligations of the parties to the franchise relationship in the crucial area of *termination* of a franchise or *non-renewal* of the franchise relationship." S. Rep. No. 95-731, at 19 (emphasis added); see H.R. Rep. No. 95-161, at 16. The Act "prohibits a franchisor from terminating a franchise during the term of the franchise agreement and

from failing to renew the relationship at the expiration of the franchise term, unless the termination or nonrenewal is based upon a ground specified or described in the legislation and is executed in accordance with the notice requirements of the legislation." S. Rep. No. 95-731, at 15.

Definition of "Franchise." The PMPA begins by identifying the agreements subject to its restrictions. It defines a "franchise" as a contract under which a refiner authorizes a retailer to use its trademark in selling motor fuel (as well as similar arrangements between refiners and distributors, between distributors and retailers, or between two distributors). 15 U.S.C. §2801(1)(A). The term "franchise" also includes any associated agreement providing for the "supply of motor fuel" or authorizing the retailer to "occupy leased marketing premises." *Id.* §2801(1)(B)(i)-(ii). Those three elements—the right to use a trademark, to occupy premises, and to obtain fuel—are known as the "statutory elements" of a franchise. J.A. 430 n.1.

Grounds for Termination or Non-Renewal. The PMPA provides that, except as permitted by the Act, no franchisor may "(1) terminate any franchise * * * prior to the conclusion of the term, or the expiration date, stated in the franchise," or "(2) fail to renew any franchise relationship." 15 U.S.C. §2802(a).[2] The Act then sets forth permissible grounds for terminating a franchise during its term or declining to renew the relationship upon the franchise agreement's expiration. *Id.* §2802(b)(2). For example, a franchisor may terminate or refuse to renew a

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[2] The Act uses the broader term "franchise relationship" in the nonrenewal context to clarify that the franchisor may have an obligation to renew even after a franchise agreement expires, and to clarify that the franchisor need not offer the same terms in the renewal agreement. See 15 U.S.C. §2801(2); S. Rep. No. 95-731, at 30.

dealer that breaches a provision of the franchise agreement that is "reasonable and of material significance to the franchise relationship." *Id.* §2802(b)(2)(A).

The Act also sets forth grounds that justify nonrenewal at the end of a franchise's term but not termination during its term. 15 U.S.C. §2802(b)(3). One ground is "[t]he failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise." *Id.* §2802(b)(3)(A). The PMPA thus does not require franchisors to keep offering the same terms in each succeeding agreement. Instead, the franchisor can propose different terms—even terms that alter the parties' economic burdens—and then refuse to renew the franchise relationship if the dealer does not agree to them. Congress thus "recognize[d] the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." S. Rep. No. 95-731, at 19. The new terms, however, must have been proposed "in good faith and in the normal course of business." 15 U.S.C. §2802(b)(3)(A)(i). And the terms must not have been proposed "for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor * * * or otherwise preventing the renewal of the franchise relationship." *Id.* §2802(b)(3)(A)(ii). The Act thus "strike[s] a balance between the at times conflicting interests of the parties." S. Rep. No. 95-731, at 15.

Notice Requirements. A franchisor must normally provide notice of its intent to terminate or not to renew "not less than 90 days prior to the date on which such termination or nonrenewal takes effect." 15 U.S.C. §2804(a). Where 90 days' notice is impractical, the franchisor must provide notice as early as "reasonably practi-

cable." *Id.* §2804(b)(1). The notice must set forth the grounds for termination or non-renewal and other specified information. *Id.* §2804(c)(3).

Remedies. The Act authorizes a dealer to "maintain a civil action against [a] franchisor" that "fails to comply with the requirements of section 2802" (the provision restricting termination and non-renewal), subject to a one-year statute of limitations. 15 U.S.C. §2805(a). The dealer has the "burden of proving the termination of the franchise or the nonrenewal of the franchise relationship"; the franchisor, however, has the burden of justifying the termination or non-renewal. *Id.* §2805(c).

The Act authorizes equitable relief, including declaratory judgments, mandatory or prohibitory injunctions, and interim relief. 15 U.S.C. §2805(b)(1). Courts are required to grant a preliminary injunction when a dealer has been terminated or non-renewed so long as there are "sufficiently serious questions" to present a "fair ground for litigation" and the balance of hardships favors relief. *Id.* §2805(b)(2). Neither irreparable harm nor a likelihood of success need be shown. See *ibid.*

Plaintiffs can also recover actual damages. 15 U.S.C. §2805(d)(1)(A). In any case involving "willful disregard" of the Act's requirements, plaintiffs can obtain punitive damages as well. *Id.* §2805(d)(1)(B). Finally, plaintiffs are entitled to attorney's fees and expert witness fees whenever they recover more than nominal damages. *Id.* §2805(d)(1)(C).

Preemption. To provide "certainty and uniformity in franchise relationships which permeate a nationwide motor fuel distribution and marketing network," the PMPA "preempts state law in the subject areas in which the federal legislation deals." S. Rep. No. 95-731, at 16. The Act thus preempts any state law with respect to "termi-

nation" of a covered franchise or "nonrenewal" of a covered franchise relationship if it differs from the federal requirements. 15 U.S.C. § 2806(a)(1). The Act also clarifies that it neither prohibits assignment of a franchise as authorized by contract or state law, nor authorizes assignment where otherwise prohibited. *Id.* § 2806(b)(1).

II. PROCEEDINGS BELOW

A. Background

This case arises out of a dispute among several Shell service station operators in Massachusetts (the "dealers"), Shell Oil Company ("Shell"), and Shell's assignee, Motiva Enterprises LLC ("Motiva"). The franchise agreements between Shell and each dealer specified a monthly "contract rent" for the station premises. See J.A. 240, 430-431.[3] For many years, Shell also offered a program (referred to by the court of appeals as a "subsidy") that reduced a dealer's rent depending on the volume of gasoline sold. See *id.* at 332-335, 430-431. The written program terms furnished to dealers "explicitly provided for cancellation [of that program] with thirty days' notice." *Id.* at 431; see *id.* at 334. The franchise agreements also contained integration clauses that required any modification to be in writing. See *id.* at 263.

In 1998, Shell, Texaco, and Saudi Refining combined their petroleum refining and marketing operations in the eastern United States by forming Motiva Enterprises LLC. See J.A. 430; C.A. App. 2476. Shell assigned its rights and obligations under its franchise agreements to

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[3] Shell typically executed two contracts with its dealers—a lease of the premises and a "dealer agreement" addressing fuel supply and trademark rights. See J.A. 239-267; C.A. App. 1395-1410. Like the court of appeals, we refer to both collectively as the "franchise agreement."

Motiva; Texaco's franchises were transferred as well. See J.A. 109, 430; C.A. App. 3608. Because the entities forming Motiva had offered different terms to their respective dealers, Motiva inherited franchise agreements with inconsistent provisions. See J.A. 218, 402. For example, unlike Shell, Texaco had calculated rent using an "asset-based" formula—10% of the value of the land, plus 11.5% of the value of the buildings, plus 11.5% of the value of the equipment. See *id.* at 218-219, 237. In addition, unlike Shell, Texaco had not offered a volume-based rent subsidy. *Id.* at 215.

Motiva took two steps that reconciled those differences but also led to the disputes in this case. First, invoking the provision authorizing it to discontinue the volume-based rent subsidy, Motiva substituted a new transitional subsidy for 16 months and then ended the subsidy entirely effective January 1, 2000. See J.A. 430-431; C.A. App. 2912-2914, 2922. Second, as each dealer's franchise agreement expired, Motiva offered a new agreement that calculated annual rent using an asset-based "10-12-12" formula similar to the one Texaco had used—10% of the value of the land, plus 12% of the value of the buildings, plus 12% of the value of the equipment. See J.A. 236-238, 450; C.A. App. 3655. As the district court observed, "the entire industry was changing the manner of computing rent" by "switch[ing] to a formulation based on the value of the station's real estate." J.A. 402; see *id.* at 196-197, 234-236. That shift reflected "a change in the use of gas stations from simply selling gasoline and oil to including also convenience stores and other amenities." *Id.* at 402; see *id.* at 217-218.

B. Proceedings in the District Court

1. On July 27, 2001, 63 Massachusetts service-station dealers filed this lawsuit against Shell and Motiva. J.A.

55-65.[4] The complaint acknowledged that the rent subsidy's written program terms authorized Shell to discontinue the subsidy on 30 days' notice. *Id.* at 71. But the dealers claimed that Shell sales representatives had orally promised that the subsidy or something like it would always exist. *Id.* at 71-72. They claimed that discontinuation of the subsidy was thus a breach of contract under state law. See *id.* at 84-85.

The complaint also included two PMPA claims. Although the complaint admitted that the dealers were "still conduct[ing] * * * retail operations under written franchise agreements" with Shell or Motiva, J.A. 69, it claimed that the elimination of the rent subsidy had "terminat[ed] the[ir] franchises" in violation of the PMPA, see *id.* at 82. Similarly, although the complaint admitted that Motiva had "offer[ed] renewals" to the dealers (and did not deny that the dealers had accepted those renewals), see *id.* at 58, it alleged that Motiva's adoption of a different method of calculating rent in the new agreements violated the Act's restrictions on non-renewal, see *id.* at 82.[5]

Roughly two years after filing suit, plaintiffs moved for a preliminary injunction ordering Motiva to reduce their rents. J.A. 124. The district court denied the motion. It observed that the "defendants did not terminate or fail to renew any of plaintiffs' leases"; rather, "[a]ll

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[4] Six dealers and an unincorporated association named the "Shell Dealers Defense Group" had previously sued Shell and Motiva in June 2000, but the association was found to lack standing. C.A. App. 3798-3804, 3863. This suit was filed by dealers purporting to be members of that association. J.A. 55.

[5] Plaintiffs also alleged that Shell and Motiva had violated U.C.C. § 2-305 by charging too much for fuel under the open price terms of their supply agreements. See J.A. 63, 77-80.

plaintiffs have signed new lease agreements." *Ibid.* And it held that "a preliminary injunction [was] inappropriate" because the dealers had "waited years before seeking preliminary injunctive relief." *Id.* at 125.

Shell and Motiva moved to dismiss and later moved for summary judgment, arguing that plaintiffs had not been "terminated" or "non-renewed" within the meaning of the PMPA because they had "renewed their franchise relationships with Defendants and continued in operation." Def. C.A. Supp. App. 8. The court denied both motions in relevant part. J.A. 88, 132.

2. The district court selected eight of the 63 plaintiffs—the parties here—to proceed to trial first. J.A. 122.[6] A 15-day jury trial began on November 15, 2004. *Id.* at 24. Consistent with their complaint, the dealers urged that their franchise agreements had been "constructively terminated" in violation of the PMPA when Motiva ended the rent subsidy in January 2000. See *id.* at 432. And the dealers contended that Motiva had "constructively non-renewed" their franchise relationships when, as each dealer's agreement expired, Motiva offered a new agreement that calculated rent using the new asset-based formula. See *id.* at 432-433.

Notwithstanding those claims, four of the eight dealers—Mac's Shell, Prashad, Karol, and Akmal—testified that they were still operating their Shell stations at the time of trial, 58 months after their alleged "termination." J.A. 138-139, 154, 161, 185. They also acknowledged that they had signed renewal agreements with Motiva when

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[6] The court initially selected 10 dealers, J.A. 122, but one lost on summary judgment and another settled, see *id.* at 135; C.A. App. 805, 809-810.

their old agreements expired during that 58-month period. *Id.* at 139, 155, 164, 186-187.[7]

Three dealers—Avramidis, RAM, and Sullivan—had continued to operate their stations throughout the stated terms of their franchise agreements after the subsidy ended; they then signed renewal agreements with Motiva when those old agreements expired and operated under the new agreements. Avramidis, for example, signed a new Motiva agreement on January 7, 2002; he then operated his station until April 30, 2004—52 months after the rent subsidy ended. J.A. 190, 193, 312-313.[8]

The last dealer, Pisarczyk, operated under an extension to his old Shell agreement until July 2000, seven months after the subsidy ended and five months before his franchise expired. See J.A. 204, 330-331. His son then purchased the property from Motiva to convert it into a garden center. *Id.* at 206-207. Pisarczyk testified that he had been planning to convert the station before the subsidy ended; he did not claim his decision to leave the service-station business had anything to do with the elimination of the rent subsidy or the new rent formula. See *id.* at 201-207; C.A. App. 1070-1078.[9]

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[7] Mac's Shell signed new agreements for its two stations on October 23, 2001. J.A. 316-321. Prashad signed an agreement on July 13, 2000. *Id.* at 268-269. Karol signed an agreement on December 21, 2000. *Id.* at 314-315. And Akmal signed an agreement on December 18, 2003. *Id.* at 310-311.

[8] RAM's owner signed a new agreement on May 10, 2001, and then operated until September 2001, when he sold the franchise to a third party. J.A. 179-182, 322-323. Sullivan signed a new agreement on May 3, 2000, and then operated until September 2000, when he sold the franchise back to Motiva. *Id.* at 148-153, 324-325.

[9] Some dealers signed the new agreements under protest. The owner of Mac's Shell wrote "[s]igned under protest or if not accept-

To support their constructive termination (and related breach-of-contract) claims, the dealers testified that—notwithstanding the express written terms permitting Shell to end the rent subsidy on 30 days' notice—Shell sales representatives had assured them that "the Subsidy or something like it would always exist, the contract rent was to be disregarded, and the cancellation provision was only intended to be invoked in a situation like a war or an oil embargo." J.A. 431; see, *e.g.*, *id.* at 136-138, 146-148. Although the franchise agreements included integration clauses that required any modifications to be in writing, see *id.* at 263, the dealers claimed that they relied on the alleged oral modifications when investing in their businesses, see, *e.g.*, *id.* at 138. Shell and Motiva vigorously disputed those claims, denying that their representatives had ever promised that the rent subsidy would be permanent. See *id.* at 230-231; C.A. App. 3596, 3723.

To support their constructive non-renewal claims, the dealers attempted to show that Motiva adopted the new asset-based rent structure to drive them out of business and take over their stations. The dealers presented evidence that Shell and Motiva had plans to increase the number of company-owned stations in some areas, in part by repurchasing franchises from dealers if "mutually agreeable" terms could be reached. See, *e.g.*, J.A. 175-

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able under protest then I sign without protest" on his new agreements. J.A. 316-321. Three others sent correspondence protesting the agreements. See J.A. 148-149; C.A. App. 2128, 2132. Another claimed he had signed under protest by participating in the suit. J.A. 191. The other two did not testify that they had signed under protest. To the contrary, one stated that the new agreement "gave [her] hope" because her new Motiva rent was lower than the Shell contract rent she had been paying after the subsidy ended. *Id.* at 143-144. And the other testified that the appraised value used to calculate his rent was "about right." *Id.* at 159.

176; C.A. App. 925-926, 930-931. Shell and Motiva's witnesses, by contrast, testified that the rent changes were motivated by the need to develop a uniform rent structure after Shell and Texaco combined their operations to form Motiva. See, *e.g.*, J.A. 218-219, 402-403; C.A. App. 3608, 3786; p. 8, *supra*. The new rent structure was also more consistent with prevailing industry practices. See, *e.g.*, J.A. 217-219, 402-403; p. 8, *supra*.[10]

A former Mobil employee, Jeffrey Bernard, testified as an expert for the dealers that Motiva's rents exceeded industry standards. See J.A. 195-196. Bernard claimed that Mobil based its rents on 8% of the value of the land, buildings, and equipment (*i.e.*, an "8-8-8" formula), and that he had heard that Sunoco and Cumberland had rents "consistent" with Mobil's. See *id.* at 195-200. But the ExxonMobil manager responsible for rent programs testified that, shortly after Bernard left in 2000, the company changed its formula to "10-10-10" in 2001 and then "12-12-12" in 2003—*more* than Motiva's "10-12-12" formula. *Id.* at 223-225. Sunoco also charged "12-12-12" by 2002. *Id.* at 225-226. Cumberland's contracts manager testified that his company charged "11-11-11" from 1998 through 2003. *Id.* at 228. And an economics professor surveyed formulas at seven major companies and found

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[10] Moreover, although plaintiffs contended that the new Motiva agreements "result[ed] in a further increase in rent," J.A. 431, evidence showed that the Motiva asset-based rents were *lower* on average than the "contract rents" under the old Shell leases—only elimination of the subsidy increased the dealers' net rents, see *id.* at 220-222. For example, Karel's net annual rent increased from $59,447 to $99,120 when the subsidy ended, but fell back to $66,371 under the new Motiva lease. See J.A. 336.

them consistent with Motiva's. See *id.* at 236-238; C.A. App. 3581.[11]

The dealers also described hardships they experienced under the new rents. One, for example, stated that she had to borrow money and withdraw savings to stay in business. J.A. 140-141. Another claimed "mental anguish." *Id.* at 150. Some dealers, however, remained quite profitable. For example, for the four years after the subsidy ended, Mac's Shell averaged more than $200,000 per year in net income and owner compensation from its two Shell stations (and a related towing service operated using station employees and facilities). *Id.* at 166-173, 348. RAM's net income doubled to $57,000 the year after the subsidy ended; according to the owner, the station "looked pretty good profit-wise." *Id.* at 182-184, 349. And Karol earned more in 2001 under the new Motiva agreement than in any year under the original subsidy since 1994. *Id.* at 141-143, 352; see p. 13 n.10, *supra*.

3. The district court instructed the jury that it could find a "termination" under the PMPA even if a dealer continued to operate its franchise. Elimination of the subsidy could amount to a "constructive termination," the court directed, if it was "such a material change that it effectively ended the lease, even though the plaintiffs continue to operate the business." J.A. 373. The court similarly instructed that a dealer could claim "nonrenewal" despite having been offered, and having accepted, a renewal agreement. "[E]ven though the franchisor says it wants to renew" and "[e]ven if the plaintiffs signed the agreement and continued to operate the business," the court stated, the jury could find a "constructive

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[11] Experts also disagreed over whether the appraisals Motiva used to calculate rent were too high. See C.A. App. 1040-1041, 1240-1244.

nonrenewal" if the "rent increases and other new provisions in the Motiva leases [were] designed to discourage the plaintiffs from renewing and to enable Motiva to convert the stations * * * to company-owned ones." *Id.* at 374-375.[12]

The jury found Shell and Motiva liable on all counts to all plaintiffs, awarding damages of $3.3 million, including $1.3 million for constructive termination and $1.2 million for constructive non-renewal. J.A. 376-386.[13] Both before and after the verdict, Shell and Motiva moved for judgment as a matter of law, arguing that "'[t]he plain language of the statute contemplates an actual ending of the franchise relationship'"—something the dealers had failed to show. See *id.* at 208-213, 387-399. The court denied those motions. See *id.* at 403-404; C.A. App. 1122, 1278. The court also awarded $1.16 million in attorney's fees and $209,000 in expert witness fees under the PMPA. J.A. 426-428. It entered a final judgment under Federal Rule of Civil Procedure 54(b). *Id.* at 405-406.

C. The Court of Appeals' Decision

The court of appeals affirmed in part and reversed in part. J.A. 429-462.

1. Addressing the dealers' "termination" claims, the court held that there was sufficient evidence that cancellation of the rent subsidy amounted to a "constructive

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[12] Shell and Motiva objected to both instructions. See J.A. 368-369 (no termination unless "you lose one of the three [statutory franchise] elements"); *id.* at 369-371 ("[T]he case law is very clear that there isn't such a thing as constructive nonrenewal."); *id.* at 356-359 (proposed instructions).

[13] The jury also awarded $1.3 million for breach of contract, but those damages were duplicative of the constructive termination award. See J.A. 376-379, 424 n.2. The other $800,000 related to the state-law fuel pricing claims. See *id.* at 384-386; p. 9 n.5, *supra*.

termination." J.A. 444-450. A dealer could establish constructive termination, the court ruled, by showing that an assignment of its franchise led to a "'breach[ ] [of] one of the three statutory components of the franchise agreement'"—namely, "'the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises.'" *Id.* at 444-445. The court held that, in this case, "the Dealers have proven to the jury's satisfaction that Motiva breached the lease component of the franchise agreements" by ending the subsidy, thereby "allow[ing] the jury to find that Shell constructively terminated the Dealers' franchises when it assigned the franchises to Motiva." *Id.* at 445-446.

The court rejected the argument that a breach of contract cannot amount to a termination under the PMPA where, as here, the plaintiff continues to operate its franchise. Relying on *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986), the court held that the breach "does not have to be a total breach" and "need not result in complete deprivation of a statutory element of the franchise to support a constructive termination." J.A. 446-447. Although the court did not hold that "any material breach of the lease would necessarily be sufficient," it stated that the district court had set an "appropriate threshold" by requiring a "breach of the lease [that] 'was such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business.'" *Id.* at 447.

The court acknowledged that its ruling was inconsistent with the concept of "constructive" termination in other areas of the law, where a plaintiff must show an "actual severance of the relationship." J.A. 446. An employee claiming constructive discharge "must leave the workplace"; a tenant claiming constructive eviction "must

move out." *Ibid.* But service stations are different, the court held, because "sunk costs, optimism, and the habit of years might lead franchisees to try to make the new arrangements work, even when the terms have changed so materially as to make success impossible." *Id.* at 446-447. "To require an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable." *Id.* at 447.

2. Turning to the "non-renewal" claims, the court held that "the PMPA does not support a claim for nonrenewal under these circumstances," where "each Dealer signed a new agreement (albeit 'under protest')." J.A. 450. The court noted that "[t]he Ninth Circuit is the only circuit so far to recognize a claim for constructive nonrenewal." *Id.* at 451 (citing *Pro Sales, Inc.* v. *Texaco, U.S.A.*, 792 F.2d 1394 (9th Cir. 1986)). And that court's approach "has been rejected by the other circuits to consider the issue," including the Seventh Circuit in *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F.3d 846 (7th Cir. 2002), and the Fifth Circuit in *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482 (5th Cir. 2003). J.A. 451.

Dersch and *Abrams Shell* had explained that allowing "constructive non-renewal" claims despite renewal of the franchise relationship would be inconsistent with the Act's elaborate notice-and-preliminary-relief provisions. J.A. 451-452. Under the Act, a dealer confronting objectionable contract terms can refuse to sign the new agreement; if there is an impasse, the franchisor must send a notice of non-renewal based on the failure to agree at least 90 days before the non-renewal takes effect. See 15 U.S.C. §2804(a). The dealer, upon receiving that notice, can seek a preliminary injunction during the 90-day period to preserve the status quo while the court determines the legality of the proposed terms. See *id.*

§ 2805(a)-(b). "[T]his notice-and-preliminary-relief structure is evidence that Congress intended to limit the reach of the PMPA to cases where either a notice is given or an actual nonrenewal has taken place." J.A. 451.

The dealers here, however, chose not to invoke that statutory mechanism. "[R]ather than insist on receiving notices of nonrenewal, the Dealers signed the new agreements 'under protest' and continued in operation under the new agreements." J.A. 452. That was inconsistent with Congress's design. "[J]ust as the PMPA requires a clear indication from franchisors that they seek nonrenewal of a franchise relationship, it likewise requires that franchisees faced with objectionable contract terms refrain from ratifying those terms by executing the contracts (even 'under protest') and operating under them." *Id.* at 452-453. A contrary rule "would enable a franchisee to sign the contract and simultaneously challenge it," permitting dealers to operate their franchises while speculating on legal claims and subjecting franchisors to unwarranted uncertainty. *Id.* at 453. The court thus refused to "recognize a claim for nonrenewal under the PMPA where the franchisee has signed and operates under the renewal agreement complained of." *Id.* at 454. The court accordingly reversed the judgment on the nonrenewal claims, affirmed on the termination claims, and vacated and remanded the fee award "for reconsideration in light of [its] mixed disposition of the claims under the PMPA." *Id.* at 462.[14]

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[14] The court rejected Shell and Motiva's remaining arguments, including challenges to the suit's timeliness, J.A. 436-441, to the state-law claims, *id.* at 441-444, 454-457, and to the damages calculation, *id.* at 458-462.

3. The court of appeals denied rehearing and rehearing en banc. J.A. 463-464. The dealers filed a petition for a writ of certiorari seeking review of the court's non-renewal ruling, and Shell and Motiva filed a petition seeking review of the termination ruling. This Court granted both petitions. 129 S. Ct. 2788, 2789.

SUMMARY OF ARGUMENT

Shell and Motiva's position in this case can be summarized as follows: "Terminate" means "terminate" and "fail to renew" means "fail to renew." Consequently, a service-station dealer that continues as a franchisee, receiving all three elements of its franchise—trademark, lease, and fuel—cannot claim it was "terminated" within the meaning of the PMPA. Likewise, a dealer that is offered and executes a renewal agreement cannot claim that the franchisor "failed to renew" the relationship.

I. A. By its plain terms, the PMPA applies only where a defendant "terminate[s]" a franchise or "fail[s] to renew" a franchise relationship. 15 U.S.C. § 2802(a). To "terminate" something is to "put an end" to it. A dealer that continues as a franchisee has not been "terminated" in any sense of the term.

The PMPA, moreover, was enacted in response to complaints about unfair "terminations" and "non-renewals" of franchises. S. Rep. No. 95-731, at 17 (1978). The Act thus "define[s] the rights and obligations of the parties * * * in the crucial area of *termination* of a franchise or *non-renewal* of the franchise relationship," leaving other aspects of the relationship to state law. *Id.* at 19, 42 (emphasis added).

The court of appeals' contrary holding—that a dealer can sue for "termination" despite "'continu[ing] to operate the business,'" J.A. 447—subjects franchisors and franchisees to an unintelligible legal standard. It also

disrupts the federal-state balance, extending federal preemption into a domain traditionally reserved to the States. And it distorts the resolution of franchise disputes by inviting dealers to recast ordinary contract claims as federal PMPA violations.

B. 1. A dealer that continues operating its franchise cannot avoid the statutory "termination" requirement by claiming "constructive termination." The Act's text, legislative history, structure, and context all confirm that Congress addressed *actual* terminations, not constructive ones. Moreover, courts that have allowed constructive termination claims under the PMPA have relied on an assignment-based theory that is patently incoherent.

2. In any event, even a "constructive termination" would require an end to the franchise. An employee claiming constructive discharge "must leave the workplace"; a tenant claiming constructive eviction "must move out." J.A. 446. The terminations are "constructive" only in the sense that the plaintiff is driven out by oppressive conditions rather than being expressly ordered out. Likewise here, a franchisee cannot claim it was constructively terminated unless it abandons the franchise.

C. The evidence failed to establish that Shell or Motiva "terminated" any of the eight dealers in this case. Four dealers were still operating their Shell stations at the time of trial, almost *five years* after their alleged "termination," earning as much as $200,000 a year. Three others continued as franchisees throughout their franchise terms. And the eighth left the service-station business for unrelated reasons. There can be no "termination," constructive or otherwise, where a dealer continues to operate its franchise for the agreement's full term or leaves for reasons unrelated to the franchisor.

II. A. The court of appeals properly rejected the non-renewal claims. The PMPA applies only where a franchisor "fail[s] to renew" the franchise relationship. 15 U.S.C. §2802(a)(2). A dealer that is offered and accepts a renewal agreement cannot claim the franchisor "failed to renew" the relationship. The Act, moreover, contains a comprehensive scheme for resolving renewal disputes. That scheme requires franchisors to give 90 days' notice of any non-renewal, and allows dealers to obtain a preliminary injunction under a relaxed standard so that a court can evaluate the proposed renewal terms before the non-renewal takes effect. Allowing dealers to sign renewal agreements while simultaneously challenging them in court frustrates Congress's carefully balanced structure.

B. That same scheme also rebuts the argument that constructive non-renewal claims are necessary to protect dealers. The PMPA's notice requirement affords dealers confronted with objectionable renewal terms ample time to obtain relief under the Act's liberal injunctive provisions.

C. Finally, Motiva did not "fail to renew" the eight dealers here. Seven were offered and signed renewal agreements. And the eighth left the service-station business five months before his franchise term ended.

ARGUMENT

Enacted in response to franchisees' complaints about unfair terminations and non-renewals, the Petroleum Marketing Practices Act by its terms provides that a franchisor cannot "terminate" a franchise agreement during its stated term, or "fail to renew" a franchise relationship at the end of the term, except on particular grounds following specified procedures. 15 U.S.C. §2802(a). The PMPA does not federalize all aspects of

petroleum franchise relationships. Instead, the Act—and the private cause of action it creates—is limited to the "crucial" relationship-ending events of "termination" and "non-renewal." S. Rep. No. 95-731, at 19 (1978).

The decision below is only partially faithful to Congress's design. The First Circuit properly concluded that, where the parties renew the franchise relationship by executing a new agreement, the dealer cannot claim that the franchisor "fail[ed] to renew" the relationship in violation of the PMPA. See J.A. 450-454. But the court erroneously held that a dealer can claim it was "terminate[d]" even where the dealer continues to operate its franchise—occupying the same premises, receiving the same gasoline, and using the same trademark. See *id.* at 444-450. Indeed, the court upheld the verdict for four dealers here even though they were still operating their Shell stations at the time of trial, almost *five years* after the alleged "termination," earning as much as $200,000 a year. And the court upheld the verdict for three other dealers even though they operated for months or years after the alleged termination, through the end of their franchises' stated terms.

That ruling cannot be reconciled with the statutory text, which requires "terminat[ion]" of a franchise, not an alleged breach of an ongoing franchise agreement. 15 U.S.C. §2802(a)(1). It ignores Congress's limited purpose of "defin[ing] the rights and obligations of the parties * * * in the crucial area of termination of a franchise"—not federalizing all petroleum franchise regulation. S. Rep. No. 95-731, at 19. The ruling subjects both franchisors and franchisees to an unintelligible legal standard. It expands federal preemption deep into an area traditionally governed by state law. And it cannot

be reconciled with the court of appeals' rejection of the parallel non-renewal claims.

I. A DEALER THAT CONTINUES AS A FRANCHISEE CANNOT CLAIM IT WAS "TERMINATED" IN VIOLATION OF THE PMPA (NO. 08-372)

The PMPA by its terms applies only where a franchisor "terminate[s]" a franchise or "fail[s] to renew" a franchise relationship. 15 U.S.C. §2802(a). The dealers in this case claim they were "terminated" when Motiva withdrew a rent subsidy, as permitted by the written program terms but allegedly in violation of oral promises that the subsidy would last forever. The dealers, however, continued as franchisees; they were never denied use of the Shell trademark, premises, or fuel. Their franchises therefore were not "terminated" within the meaning of the Act.

A. The PMPA Makes Clear That a "Termination" Requires an Actual End to the Franchise

1. *The PMPA's Text Is Unambiguous*

This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). "When the words of a statute are unambiguous, * * * [the] 'judicial inquiry is complete.'" *Id.* at 254. "When terms used in a statute are undefined," moreover, this Court "give[s] them their ordinary meaning." *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995).

Here, the statute could not be more clear. The PMPA states that a franchisor may not "*terminate* any franchise" except on particular grounds following specified procedures. 15 U.S.C. §2802(a)(1) (emphasis added). In any suit, "the franchisee shall have the burden of proving the *termination* of the franchise." *Id.* §2805(c) (empha-

sis added). To "terminate" something means to "put an end" to it. *Black's Law Dictionary* 1609 (9th ed. 2009); *Webster's New International Dictionary of the English Language* 2605 (2d ed. 1954) (same). Accordingly, there can be no "termination" within the meaning of the statute unless the franchise is "put [to] an end." The Act also provides that "[t]he term 'termination' includes cancellation." 15 U.S.C. §2801(17). But the ordinary meaning of "cancel" is essentially the same: to "annul or destroy." *Webster's*, *supra*, at 389. Consequently, the Act does not apply unless the franchise has been "put [to] an end," "annul[led]," or "destroy[ed]."

The Act defines the "franchise" in terms of three elements—the right to use the franchisor's trademark, the right to obtain motor fuel, and the right to occupy the premises. See 15 U.S.C. §2801(1)(A)-(B). Thus, for a termination to occur, at least one of those three elements must be brought to an end. For that reason, courts have routinely rejected the argument that a mere breach of contract by a franchisor can amount to a "termination" where the dealer continues in business, occupying the same premises, receiving the same fuel, and using the same trademark. See, *e.g.*, *Clark* v. *BP Oil Co.*, 137 F.3d 386, 392 (6th Cir. 1998); *Portland 76 Auto/Truck Plaza, Inc.* v. *Union Oil Co. of Cal.*, 153 F.3d 938, 948 (9th Cir. 1998); *McGinnis* v. *Star Enter.*, No. 93-1234, 1993 WL 455587, at *4 (5th Cir. Oct. 21, 1993).

In *Clark*, for example, the Sixth Circuit rejected a claim that a franchisor had "terminated" a franchise by charging more for fuel than the franchise agreement allowed. "[E]ven if [the dealer] can establish a breach of the price term," the court explained, "it does not trigger the protections of the PMPA since he still retains use of BP's trademark, use of the Emerald-Mart premises, and

continues to receive BP-branded motor fuel." 137 F.3d at 392. Similarly, in *Portland 76*, the court held that a dealer could not establish a termination because it had "stayed in business until the time came for renewal." 153 F.3d at 948. And in *McGinnis*, the Fifth Circuit rejected a claim for termination where the plaintiff "continued as a franchisee." 1993 WL 455587, at *4; cf. *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482, 486-487 (5th Cir. 2003) (characterizing statement as dictum). Other courts have agreed. See, *e.g.*, *Jet, Inc.* v. *Shell Oil Co.*, No. 02 C 2289, 2002 WL 31641627, at *3-5 (N.D. Ill. Nov. 22, 2002), aff'd on other grounds, 381 F.3d 627 (7th Cir. 2004); *Deamor, Inc.* v. *Mobil Oil Corp.*, No. 90-2227, 1990 WL 124927, at *1 (E.D. Pa. Aug. 23, 1990). Those decisions recognize what is clear from the statutory text: A dealer that continues operating and is not denied any of the three elements of its franchise—trademark, premises, or fuel—has not been "terminated" in any sense of the term.

While the ordinary meanings of "terminate" and "cancel[ ]" are dispositive, their technical meanings require the same result. When Congress uses a term of art, this Court presumes that Congress "intended it to have its established meaning." *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991). The Act's seemingly tautological statement that "[t]he term 'termination' includes cancellation," 15 U.S.C. §2801(17), suggests that Congress may have been using those terms in a technical sense here.

"Termination" and "cancellation" have established meanings under the Uniform Commercial Code. They describe two distinct ways of putting an end to a contract. A "'[t]ermination' occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach," while a "'[c]an-

cellation' occurs when either party puts an end to the contract for breach by the other." U.C.C. §2-106(3)-(4); see also 13 S. Jenkins, *Corbin on Contracts* §67.2, at 8-12 (rev. ed. 2003). In other words, a party "cancels" a contract by ending it because the other party breached, and "terminates" a contract by ending it for other reasons.

That dichotomy explains Congress's otherwise seemingly superfluous clarification that "[t]he term 'termination' includes cancellation." 15 U.S.C. §2801(17).. Congress was concerned that franchisors might insist on expansive contractual rights that would enable them to end a franchise over "technical or minor violations" by the franchisee (a "cancellation" in the U.C.C.'s parlance). S. Rep. No. 95-731, at 17-18. (That is why the Act permits termination for breach only if the provision breached is "reasonable and of material significance." 15 U.S.C. §2802(b)(2)(A).) By specifying that "'termination' includes cancellation," Congress foreclosed any argument that termination for breach is not covered because it technically constitutes a "cancellation" rather than a "termination."

Most important here, Congress's use of those terms underscores the PMPA's limited scope. While "termination" and "cancellation" differ in how the contracting party justifies its actions, both require that the party "*put[] an end* to the contract." U.C.C. §2-106(3)-(4) (emphasis added). "[T]ermination and cancellation of an agreement *extinguish future obligations of both parties* * * *." 13 *Corbin on Contracts*, *supra*, §67.2, at 12 (emphasis added). A mere breach of contract thus cannot be deemed a "termination" where both parties continue to perform. See, *e.g.*, *Comedy Club, Inc.* v. *Improv West Assocs.*, 553 F.3d 1277, 1289 & nn.12-13 (9th Cir. 2009) (although "a material breach * * * may give grounds for

the non-breaching party to cancel the contract," "[a] breach by a party to a contract does not in itself cancel the contract"). A dealer that continues to operate—receiving all three elements of its franchise—has not been "terminated" in either the ordinary or technical sense of the term.

2. *The Legislative History Confirms That Congress Meant What It Said*

To the extent legislative history is relevant, it confirms the Act's limited scope. Congress enacted the PMPA in response to "numerous complaints by franchisees of unfair *terminations* or *non-renewals* of their franchises." S. Rep. No. 95-731, at 17 (emphasis added); see H.R. Rep. No. 95-161, at 14 (1977). Legislators were concerned that dealers "may find their contracts *canceled* simply because a company chooses to *end* the franchise relationship." 124 Cong. Rec. 12,761 (1978) (statement of Sen. Durkin) (emphasis added); see also 123 Cong. Rec. 10,383-84 (1977) (statement of Rep. Long); *Petroleum Marketing Practices Act: Hearing on S. 19, S. 743, and H.R. 130 Before the Subcomm. on Energy Conservation and Regulation of the S. Comm. on Energy and Natural Resources*, 95th Cong. 173, 185 (1977) ("*Senate Hearing*") (statement of Charles Binsted).

Congress drafted the statute to address those specific problems. It sought to "define the rights and obligations of the parties to the franchise relationship in the crucial area of *termination* of a franchise or *non-renewal* of the franchise relationship." S. Rep. No. 95-731, at 19 (emphasis added); see H.R. Rep. No. 95-161, at 16. Congress did not consider other aspects of the franchise relationship unimportant. It merely left their regulation to state law: "State laws dealing with [other] aspects of the relationship are not preempted." S. Rep. No. 95-731, at 42.

Here, for example, the dealers claimed that elimination of the rent subsidy "constructively terminated" their franchises, but also relied on the same allegations to claim breach of contract. See p. 9, *supra*. The jury found in their favor on both sets of claims, returning duplicative awards of $1.3 million on each. See p. 15 & n.13, *supra*. The "constructive" claims thus were hardly necessary to provide meaningful relief. "[T]he PMPA was enacted to address one narrow, yet crucial, aspect of petroleum franchise relationships—the termination of franchises and the nonrenewal of franchise relationships." *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F.3d 846, 859 (7th Cir. 2002). It was not designed to turn every franchise dispute into a federal case.

3. *The Court of Appeals' Contrary Ruling Renders the Statute Unintelligible and Disrupts the Federal-State Balance*

In enacting the PMPA, Congress sought to "*clearly define* the rights and obligations of the parties." S. Rep. No. 95-731, at 19 (emphasis added). But the court of appeals' interpretation renders the statute unintelligible. It simply is not possible to determine whether a "termination" has occurred if the word "terminate" does not require an end. Here, for example, the district court instructed the jury—and the court of appeals held—that elimination of the rent subsidy could amount to a "termination" if it was "'such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business.'" J.A. 447 (quoting J.A. 373). Nowhere did either court explain how a breach could "effectively end[]" a franchise when the plaintiff "continue[s] to operate" it. That incoherent standard allows dealers to allege PMPA claims in virtually any contract dispute. Indeed, four dealers here were still operat-

ing their Shell stations at the time of trial, five years after their alleged "termination," and earning as much as $200,000 a year doing so. See pp. 10, 14, *supra*. If the record supports a finding of "termination" here, it is hard to imagine a case where it would not.

The court of appeals' interpretation, moreover, would disrupt the traditional federal-state balance. "[T]he regulation of petroleum franchise relationships has traditionally been a matter of local concern in which the parties frame their relationships with reference to State law." *Dersch*, 314 F.3d at 861. "Congress enacted the PMPA to federalize the standards by which petroleum franchises are terminated and petroleum franchise relationships are nonrenewed, not to create a federal common law for governing petroleum franchise agreements." *Id.* at 861-862. The Act thus extends federal law only into a narrow field—termination and non-renewal. 15 U.S.C. § 2802(a).

By expanding the meaning of "terminate" to cover a host of additional circumstances, the decision below extends federal law into a domain reserved to the States. Moreover, because the PMPA preempts inconsistent state laws respecting "termination," 15 U.S.C. § 2806(a), that expansion of federal authority affirmatively ousts state law. As this Court has cautioned, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). The court of appeals' expansive construction, however, has precisely that effect.

That intrusion has a profound effect on the resolution of franchise disputes. The PMPA provides remedies that contract law typically does not. It permits punitive damages, 15 U.S.C. § 2805(d)(1)(B), which are ordinarily

barred on contract claims, *Barnes* v. *Gorman*, 536 U.S. 181, 187-188 (2002). Courts *must* award attorney's fees and expert witness fees whenever a plaintiff recovers more than nominal damages, 15 U.S.C. §2805(d)(1)(C), contrary to the normal "American Rule," see *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). And the PMPA's standard for injunctive relief is more "lenient" than the norm. See *Dersch*, 314 F.3d at 862-863 & n.16 (citing 15 U.S.C. §2805(b)(2)). Plaintiffs thus have every incentive to recast ordinary contract disputes as federal PMPA claims. "[T]he PMPA was not designed to provide franchisees with a federal forum for the resolution of run-of-the-mill contract disputes * * * ." *Id.* at 862. But the First Circuit's approach steers precisely such disputes into federal court.

B. A Dealer That Continues Operating Its Franchise Cannot Avoid the Statutory "Termination" Requirement by Claiming "Constructive Termination"

The court below acknowledged that "no actual termination occurred" in this case, but nonetheless affirmed on a theory of "constructive termination." J.A. 432, 445-446. That theory cannot be reconciled with the statutory text. Nothing in the PMPA covers "constructive," as opposed to "actual," terminations. But even if the Act created a cause of action for "constructive termination," "constructive" terminations would still require an end to the franchise. As the court of appeals recognized, an employee claiming "constructive" discharge or a tenant claiming "constructive" eviction must show "an actual severance of the relationship": "The employee must leave the workplace; the tenant must move out." *Id.* at 446. The termination is "constructive" only in the sense that the plaintiff is compelled to leave by oppressive conditions rather

than being expressly fired or evicted. That same requirement of an actual end must govern here as well: A dealer that continues to operate its franchise—occupying the same premises, receiving the same fuel, and using the same trademark—has not been "terminated," constructively or otherwise.

1. *The PMPA Does Not Allow Claims for "Constructive Termination"*

a. The PMPA's text does not encompass "constructive terminations." It provides that "*no franchisor* * * * may * * * terminate any franchise" except pursuant to the grounds and procedures set forth. 15 U.S.C. §2802(a)(1) (emphasis added). The Act thus requires, not merely that the franchise *be terminated*, but also that the *franchisor* be the one that terminates it. That language is most naturally read to exclude "constructive" terminations—*i.e.*, situations where the *franchisee* ends the franchise in response to burdensome conduct by the franchisor short of actual denial of a statutory franchise element. See *Moro* v. *Shell Oil Co.*, 91 F.3d 872, 875 (7th Cir. 1996) ("Under the PMPA, the plaintiffs had the burden of proving that Shell, and not the plaintiffs themselves, terminated the franchise."). Indeed, the court of appeals' observation that the dealers here had to proceed on a theory of "constructive termination" because "no actual termination occurred" (J.A. 432) implicitly admits that a "constructive termination" is something other than what the statutory text "actual[ly]" covers.

The legislative history confirms that interpretation. The complaints that prompted Congress to act concerned *actual* terminations, not constructive ones. See S. Rep. No. 95-731, at 17-18; p. 27, *supra*. A franchisee trade group representative expressly noted the Act's limited scope in the Senate hearing: "We fully understand that

this bill deals with only a part of our overall problem. While it will provide needed re[l]ief in so far as the dealer's tenure in the service station is concerned, *it does not deal with the economic terminations* resulting from anticompetitive and other unfair marketing practices engaged in by some suppliers." *Senate Hearing* 185 (statement of Charles Binsted) (emphasis added). That sort of conduct, the representative observed, would have to be addressed by "separate legislation." *Ibid.*

The PMPA's terminology of "termination" and "cancellation," moreover, has roots in the Uniform Commercial Code. See pp. 25-26, *supra*. Nothing in the U.C.C.'s text, its official commentary, the leading treatises, or the cases construing it suggests that the U.C.C.'s definitions of "termination" and "cancellation" encompass "constructive terminations" or "constructive cancellations." See, *e.g.*, U.C.C. §2-106(3)-(4) & cmt. 3; 1 J. White & R. Summers, *Uniform Commercial Code* §3-6, at 215-222 (5th ed. 2006); 1 T. Quinn, *Uniform Commercial Code Commentary Law and Digest* §2-106, at 2-69 to 2-87 (2d ed. 2002). Congress would not have invoked those technical U.C.C. definitions if it had intended to cover constructive terminations.

Case law under state statutes that regulate franchise terminations in other contexts supports the same conclusion. While pre-PMPA case law is essentially lacking, subsequent cases have routinely refused to permit claims for constructive termination under those statutes. In *Coast to Coast Stores, Inc.* v. *Gruschus*, 667 P.2d 619 (Wash. 1983), for example, the Washington Supreme Court rejected a claim for "termination" where a franchisor repossessed the franchisee's inventory, effectively forcing it out of business. The court explained: "[N]ot even * * * the abandonment of the business by the fran-

chisee will terminate the franchise. * * * [A] franchise is terminated only when the agreement between the franchisee and franchisor is brought to an end, terminating the franchisee's right to use the franchisor's trade name, service mark, or the like." *Id.* at 623. Many other courts have reached the same conclusion.[15] Some courts in recent years have expanded those other statutes to cover constructive terminations, see pp. 42-43, *infra*, but at the time Congress enacted the PMPA, franchisees apparently had not even *argued* that those other statutes extended that far.[16]

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[15] See *Fuller Ford, Inc.* v. *Ford Motor Co.*, No. CIV. 00-530-B, 2001 WL 920035, at *13 (D.N.H. Aug. 6, 2001) (statute "does not apply to constructive terminations"); *Morgan Assocs., Inc.* v. *Midwest Mut. Ins. Co.*, 519 N.W.2d 499, 502 (Minn. App. 1994) ("Appellant * * * argues that the effect of the restrictions amounted to a 'constructive termination.' There is no such term in the statute."); *Dave Greytak Enters.* v. *Mazda Motors of Am., Inc.*, 622 A.2d 14, 19-21 (Del. Ch. 1992) (statute "concerns only the express or actual termination or cancellation of * * * a franchise," not "'[e]ffective termination'"), aff'd mem., 609 A.2d 668 (Del. 1992); *Zeno Buick-GMC, Inc.* v. *GMC Truck & Coach*, 844 F. Supp. 1340, 1351 (E.D. Ark. 1992) ("[T]he prohibition goes to actual termination of the franchise rather than to constructive termination."), aff'd mem., 9 F.3d 115 (8th Cir. 1993); *Adolph Coors Co.* v. *Rodriguez*, 780 S.W.2d 477, 480 (Tex. App. 1989) (refusing to "extend the language of [the] termination provisions to include pre-termination wrongs"); *Carlock* v. *Pillsbury Co.*, 719 F. Supp. 791, 852 (D. Minn. 1989) ("Constructive termination of a franchise is not actionable * * * ."); *Speed Auto Sales, Inc.* v. *Am. Motors Corp.*, 477 F. Supp. 1193, 1199 (E.D.N.Y. 1979) (rejecting theory); cf. *Capital Equip., Inc.* v. *CNH Am., LLC*, No. 4:04CV00381, 2004 WL 3406091, at *12 (E.D. Ark. Sept. 27, 2004) (declining to resolve issue).

[16] Many state franchise statutes predate the PMPA, see ABA Section of Antitrust Law, *The Franchise and Dealership Termination Handbook* apps. A-C, at 237-252 (2004), but the earliest reported case we have found—state or federal—addressing a claim for "constructive termination" of a franchise in those terms was a PMPA case decided in 1979. See *Sere* v. *Husky Oil Co.*, 475 F. Supp. 135,

The PMPA's elaborate grounds and procedures for termination confirm Congress's intent. See 15 U.S.C. §§2802, 2804. Those provisions only make sense as applied to *actual* terminations. No franchisor, for example, could be expected to notify a franchisee 90 days before *constructively* terminating it, much less state the grounds therefor. See API Cert. Br. 18-19.

That the PMPA covers only actual, not constructive, terminations does not mean it is limited to formal written or oral terminations. Actions can speak louder than words. A franchisor that refuses to provide the three statutory elements of a franchise—by rescinding trademark rights or cutting off fuel supply, for example—has *actually* "terminated" the franchise, even absent an express statement of termination. Cf. *Dersch*, 314 F.3d at 864 & n.17. But a franchisor that merely commits a breach of the franchise agreement—even a breach that increases the dealer's burdens—has not "terminated" the dealer in any sense.

b. Given all that, it is fair to ask how the theory of "constructive termination" could have arisen under the PMPA. It did not, in fact, derive from any plausible interpretation of the word "terminate." It originated in a view of the law of *assignments* first articulated in *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986). No other court of appeals had actually relied on *Barnes* to sustain a constructive termination claim until this case. None-

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137 (D. Mont. 1979) (rejecting claim without addressing theory's validity). In *American Motors Sales Corp.* v. *Semke*, 384 F.2d 192 (10th Cir. 1967), a court allowed a suit by an automobile dealership driven out of business by its franchisor, but the statute there was not limited to terminations, and the court relied on legislative history addressing abandonment by the franchisee, not "constructive termination." See *id.* at 194-195 & n.1.

theless, *Barnes*'s assignment-based theory has dominated the constructive termination case law under the PMPA. For that reason, nearly every appellate decision even to mention "constructive termination" has involved an assignment. See, *e.g.*, *May-Som Gulf, Inc.* v. *Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989). And courts have refused to apply the doctrine absent an assignment. See, *e.g.*, *Atl. Autocare, Inc.* v. *Shell Oil Prods. Co. LLC*, 605 F. Supp. 2d 463, 468-470 (S.D.N.Y. 2009); *Meghani* v. *Shell Oil Co.*, 115 F. Supp. 2d 747, 755-760 (S.D. Tex. 2000), aff'd mem., 273 F.3d 1098 (5th Cir. 2001); cf. *April Mktg. & Distrib. Corp.* v. *Diamond Shamrock Ref. & Mktg. Co.*, 103 F.3d 28, 30 n.4 (5th Cir. 1997). *Barnes*'s assignment-based theory, however, is utterly incoherent.

The plaintiff in *Barnes* claimed that the franchisor, Gulf, had "constructively terminated" the franchise by assigning it to another entity that "increase[d] the * * * cost of gasoline over the franchise's stipulated price." 795 F.2d at 359. The district court rejected that claim because "Barnes was still in business as a Gulf retailer." *Id.* at 360. The Fourth Circuit reversed, holding that the assignment converted what would otherwise be a breach of contract into a constructive termination. "[E]ven if an assignment of the franchise is authorized by state law," the court held, "the franchisee can obtain relief under the Act if the franchisee can no longer obtain gasoline at the stipulated franchise price." *Id.* at 362. Fuel supply, the court reasoned, is one of the three statutory elements Congress sought to protect, and franchisors should not be allowed to "circumvent the protections the Act affords a franchisee by the simple expedient of assigning the franchisor's obligation to an assignee who increases the franchisee's burden" in violation of the franchise agree-

ment. *Ibid.* The decision below invoked that same theory here, holding that "Motiva breached the lease component of the franchise agreements" and that Motiva's breach "allowed the jury to find that Shell constructively terminated the Dealers' franchises when it assigned the franchises to Motiva." J.A. 445-446.

That makes no sense. The PMPA addresses "terminations," not lawful assignments followed by contract breaches. Reading the Act in accordance with those plain terms does not allow franchisors to "circumvent the [Act's] protections." *Barnes*, 795 F.2d at 362. If conduct would not amount to a "termination" when undertaken by the franchisor itself, the franchisor would not in any sense be "circumvent[ing] the protections [of] the Act" by validly assigning the franchise to someone else who engages in that same conduct. In either instance, the dealer's remedy for any conduct that violates the agreement is a breach-of-contract suit—not an action for "termination" under the PMPA.

Barnes worried that an assignee "might not have the resources to satisfy a judgment." 795 F.2d at 362. But there is no federal interest in ensuring deep pockets to satisfy a state-law breach-of-contract claim. And States are perfectly capable of regulating assignments to prevent franchisors from avoiding state-law responsibilities. See, *e.g.*, U.C.C. §2-210(1)-(2).

That "assignment-plus-breach" theory also defies the statutory text. The PMPA declares in no uncertain terms that it is neutral with regard to state-law assignment rights: "Nothing in this [Act] authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law * * * ." 15 U.S.C. §2806(b)(1). When a

speaker at the House hearing expressed concern that the Act would "create a new right of assignment," the subcommittee chair responded: "I would make it very clear at this point, just so that the record does not get confused, that is not the intention of the legislation * * * ." *Petroleum Marketing Practices: Hearings on H.R. 130 et al. Before the Subcomm. on Energy and Power of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 219 (1977) (statement of Rep. Dingell). After quoting § 2806(b)(1) in full, he added: "I want our legislative history clear: *it is neutral*." *Ibid.* (emphasis added); see also H.R. Rep. No. 95-161, at 32 ("[T]he provisions of the title are not to be construed as authorizing any transfer or assignment of a franchise. Neither, however, are the provisions of the title to be construed as prohibiting any transfer or assignment of a franchise * * * ."); S. Rep. No. 95-731, at 42-43 ("[A]s a general rule, assignability of franchises is a matter left to State law."). Given that neutrality, it is impossible to read the PMPA as transforming what would otherwise be mere contract breaches into violations of federal law merely because they are preceded by valid assignments.

Barnes quoted another passage of the Senate Report stating that "'there is an area in which Federal termination provisions under this legislation and State-granted rights of assignability of a franchise may conflict.'" 795 F.2d at 362 (quoting S. Rep. No. 95-731, at 43). Courts, the report asserted, should apply "'general principles of equity'" to resolve those conflicts. *Ibid.* Even assuming that statement accurately reflects the law,[17] the only

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[17] This passage of the Senate Report is omitted from the otherwise often identical House Report, see H.R. Rep. No. 95-161, at 32-33, and is hard to square with the statutory text, 15 U.S.C. § 2806(b)(1).

"area" of potential "conflict" the report identifies concerns *actual* terminations. The two examples it gives—a franchisee that assigns its franchise to avoid a termination, and a franchisor that actually terminates a franchisee to frustrate a valid assignment by the franchisee—make that clear. See S. Rep. No. 95-731, at 43. Nothing in that discussion (let alone the statutory text) suggests that "general principles of equity" can transmogrify ordinary contract breaches into "constructive terminations" merely because they follow valid assignments.

Barnes also stated that an assignment is "tantamount to a constructive termination" if it *violates* state law. 795 F.2d at 363. The plaintiff in *Barnes* argued that the assignment there was invalid because the assignee charged more for fuel, invoking a U.C.C. provision prohibiting assignments that materially increase the other party's burdens. See *ibid.* (citing Virginia's version of U.C.C. §2-210). *Barnes* approved that theory. The PMPA, the court noted, defines "franchise" to include (among other things) "'the unexpired portion of any franchise * * * which is transferred or assigned *as authorized* by * * * State law,'" *ibid.* (quoting 15 U.S.C. §2801(1)(B)(iii)) (emphasis added), and does not "'authorize[] any transfer or assignment'" that state law prohibits, *ibid.* (quoting 15 U.S.C. §2806(b)(1)). "Implicit in these provisions," the court asserted, "are the concepts that an assignment that is unauthorized by state law is prohibited and that the unexpired portion of a franchise that has been invalidly assigned is no longer a franchise as defined by the Act." *Ibid.*

That "invalid assignment" theory is similarly unsupportable and cannot sustain the judgment here.[18] The Act does not authorize assignments that are prohibited by state law. 15 U.S.C. §2806(b)(1). But that does not mean that "an assignment that is unauthorized by state law is prohibited" *by the PMPA*. *Barnes*, 795 F.2d at 363. The PMPA is neutral with respect to assignments; it does not convert every violation of state assignment law into a federal PMPA claim. See pp. 36-37, *supra*.

Nor is there any merit to *Barnes*'s suggestion that an invalid assignment constructively terminates a franchise because "the unexpired portion of a franchise that has been invalidly assigned is no longer a franchise as defined by the Act." 795 F.2d at 363. The original franchise does not cease to exist merely because it has been invalidly assigned. The assignment's invalidity merely means that the *assignment* is ineffective, so that the assignor (rather than the assignee) remains the contracting party. See U.C.C. §2-210 cmt. 3; 6 Am. Jur. 2d *Assignments* §155, at 245 (1999); 6A C.J.S. *Assignments* §119, at 514 (2004); cf. U.C.C. §2-210(2)(a) (delegation "does not relieve the delegating party of any duty to perform"). An invalidly assigned franchise thus remains a "franchise" between the *assignor* and the franchisee under the remainder of the statutory definition, which plainly encom-

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[18] The First Circuit did not rely on that theory below. See J.A. 444-450. The dealers argued the theory only in a footnote, see Pltfs. C.A. Br. 46-47 n.30, and the jury was not instructed on it, see J.A. 372-374. The theory does not even fit the facts of this case: The dealers' burdens increased because Motiva ended the rent subsidy, not because Shell assigned the agreements to Motiva over a year earlier. See pp. 7-14, *supra*.

passes the original franchisor-franchisee contract. See 15 U.S.C. §2801(1)(A), (B)(i)-(ii).[19]

Barnes's theory that "the unexpired portion of a franchise that has been invalidly assigned is no longer a franchise," 795 F.2d at 363, also yields perverse results. The PMPA protects only "franchises" from termination. 15 U.S.C. §2802(a)(1). Thus, if an invalidly assigned franchise were no longer a "franchise," the dealer would lose the *protections* of the Act following an assignment that turned out to be invalid. Once the statute of limitations had run on the invalid assignment, the assignee could terminate the dealer with impunity. Congress surely did not intend that result.

The entire edifice of "constructive termination" law under the PMPA thus rests on a case that plainly makes no sense. Although *Barnes* is often cited, the case's rationale has not become any more persuasive through repetition. This Court should reject the distorted statutory constructions that gave birth to the constructive termination theory, and reject the theory as well.

2. *Even If the PMPA Covered Constructive Terminations, It Would Still Require an End to the Franchise*

Even assuming the PMPA applies to "constructive terminations," such a claim would still require that the dealer lose the franchise. Where Congress borrows from an existing body of law, it is presumed to "'know[] and adopt[] the cluster of ideas that were attached to each borrowed word.'" *Beck* v. *Prupis*, 529 U.S. 494, 500-501 (2000). The court of appeals conceded that, in other con-

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[19] The putative assignor may be in breach because the franchisee is entitled to receive performance from the assignor rather than the assignee. But that is still only a breach, not a "termination."

texts where "constructive terminations" are recognized—such as employment and landlord/tenant law—there must still be an "actual severance of the relationship." J.A. 446. That was the state of the law when Congress enacted the PMPA. And that is the only understanding Congress could have incorporated into the Act (if it allowed constructive termination claims at all).

a. In the employment context, an employee claiming "constructive" discharge "must leave the workplace." J.A. 446. "Under the constructive discharge doctrine, an employee's *reasonable decision to resign* because of unendurable working conditions is assimilated to a formal discharge for remedial purposes." *Pa. State Police* v. *Suders*, 542 U.S. 129, 141 (2004) (emphasis added). "[A] constructive discharge is functionally the same as an actual termination" in that "both 'en[d] the employer-employee relationship.'" *Id.* at 148. Accordingly, "[a]n employee claiming constructive discharge must actually leave employment." 1 B. Lindemann & P. Grossman, *Employment Discrimination Law* 1449 (4th ed. 2007); see also 2 *EEOC Compliance Manual* §612.9(a) (2008); *Rodriguez-Pinto* v. *Tirado-Delgado*, 982 F.2d 34, 37 (1st Cir. 1993); *Pedro-Cos* v. *Contreras*, 976 F.2d 83, 85-86 (1st Cir. 1992); *Mills* v. *Williams*, 276 F. App'x 417, 419 (6th Cir. 2008). A constructive discharge is "constructive" only in the sense that the employee quits because of unbearable conditions rather than being fired—not in the sense that he continues to be employed.

Similarly, a tenant claiming that his landlord's interference with his use of the property amounts to a "constructive" eviction "must move out." J.A. 446. "[I]t is necessary that the tenant relinquish the premises in order that there be a 'constructive eviction,'" as continued occupancy would be both "'logically and legally contra-

dictory.'" 1 H. Tiffany, *The Law of Real Property* § 143, at 233-234 (3d ed. 1939 & Supp. 2008). "[T]here is no constructive eviction where the tenant continues in possession, however much he may be disturbed in the beneficial enjoyment of the premises." 52A C.J.S. *Landlord & Tenant* § 968, at 363 (2003) (footnote omitted).[20]

The state franchise case law that has developed following the PMPA's enactment supports the same requirement. While many courts have refused to allow "constructive termination" claims altogether, see pp. 32-33 & n.15, *supra*, even those that allow them ordinarily require an end to the franchise. Thus, in *Taylor Equipment, Inc.* v. *John Deere Co.*, 98 F.3d 1028 (8th Cir. 1996), the court rejected a claim of "constructive[ ] cancell[ation]" under South Dakota law because the franchisee "continued to be an active * * * dealer"—a status "fundamentally at odds" with its claim. *Id.* at 1035 & n.8. Likewise, in *Remus* v. *Amoco Oil Co.*, 794 F.2d 1238 (7th Cir. 1986), the court explained that a "constructive termination" occurs under Wisconsin law only where a franchisor "mak[es] the dealer's competitive circumstances so desperate that the dealer 'voluntarily' gives up the franchise"—in other words, "drive[s] the dealer out of business." *Id.* at 1240-1241.[21] Many other cases have reached the same conclu-

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[20] See also 49 Am. Jur. 2d *Landlord and Tenant* § 517, at 522 (2006); *Stinson, Lyons, Gerlin & Bustamante, P.A.* v. *Brickell Bldg. 1 Holding Co.*, 923 F.2d 810, 815 (11th Cir. 1991); *Jaffe-Spindler Co.* v. *Genesco, Inc.*, 747 F.2d 253, 256 & n.2 (4th Cir. 1984); *S. Falls Corp.* v. *Kalkstein*, 349 F.2d 378, 385 (5th Cir. 1965); *Liberal Sav. & Loan Co.* v. *Frankel Realty Co.*, 30 N.E.2d 1012, 1017 (Ohio 1940).

[21] Language in the Wisconsin statute arguably extended beyond constructive terminations to conduct with "substantially adverse although not lethal effects," 794 F.2d at 1240-1241, but the PMPA contains no comparable language.

sion.[22] While a handful of contrary cases can be found (decided well after the PMPA's enactment),[23] the weight of authority construing state franchise statutes clearly requires an end to the franchise.

Consequently, to the extent the PMPA permits constructive termination claims, "[t]he accurate analogy * * * would be to a franchisee who shut down its station because the franchisor caused conditions so onerous that the franchisee could not continue in business." *Abrams Shell* v. *Shell Oil Co.*, 216 F. Supp. 2d 634, 641 (S.D. Tex. 2002), aff'd on other grounds, 343 F.3d 482. A plaintiff that continues as a franchisee—using the same trade-

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[22] See *Barney Holland Oil Co.* v. *FleetCor Techs., Inc.*, 275 F. App'x 351, 358-359 (5th Cir. 2008) ("In general, constructive termination requires that the licensee be effectively forced out of business."); *E. Bay Running Store, Inc.* v. *NIKE, Inc.*, 890 F.2d 996, 1000 n.6 (7th Cir. 1989) ("uncontested fact[ ] that plaintiff retains the right to sell Nike Air products" foreclosed constructive termination claim); *Bright Bay GMC Truck, Inc.* v. *Gen. Motors Corp.*, 593 F. Supp. 2d 495, 497 (E.D.N.Y. 2009) (no termination because "Plaintiff continues to operate a GMC franchise"); *Lazar's Auto Sales, Inc.* v. *Chrysler Fin. Corp.*, 83 F. Supp. 2d 384, 389-390 (S.D.N.Y. 2000) (no termination because "dealership is still open for business today"); *Healy* v. *Carlson Travel Network Assocs., Inc.*, 227 F. Supp. 2d 1080, 1090 (D. Minn. 2002) ("de facto termination" occurs "only where the franchisor * * * makes it effectively impossible for the franchisee to do business"); cf. *JPM, Inc.* v. *John Deere Indus. Equip. Co.*, 94 F.3d 270, 271-272 (7th Cir. 1996) ("assum[ing]" viability of constructive termination claim where franchisor coerces dealer to sell its business); *Am. Bus. Interiors, Inc.* v. *Haworth, Inc.*, 798 F.2d 1135, 1141 (8th Cir. 1986) (allowing claim where franchisor refused to do business with franchisee); *In re Kirkwood Kin Corp.* v. *Dunkin' Donuts, Inc.*, No. 94C-03-189, 1997 WL 529587, at *9 (Del. Super. Jan. 29, 1997); *Meyer* v. *Kero-Sun, Inc.*, 570 F. Supp. 402, 406-407 (W.D. Wis. 1983); ABA Section of Antitrust Law, *supra*, at 17-20.

[23] See, *e.g.*, *Petereit* v. *S.B. Thomas, Inc.*, 63 F.3d 1169, 1181-1183 (2d Cir. 1995) (Connecticut law).

mark, receiving the same fuel, and occupying the same premises—has not been "terminated" in any sense.

"Constructive termination" claims, moreover, cannot become a license for suit every time a dealer finds its franchise uneconomical. If the Court were to create such a cause of action, the Court would also have to articulate its boundaries carefully. To prevail on a "constructive termination" claim, for example, a plaintiff would have to show that the franchisor's conduct was so severe that a *reasonable franchisee* would have been *compelled* to abandon its franchise.[24] A plaintiff would also have to show that it was forced to end its franchise because the franchisor acted *wrongfully* with respect to the regulated relationship—*i.e.*, that the franchisor violated one of the three statutory elements of the franchise agreement.[25]

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[24] As this Court explained in the constructive discharge context, "[t]he inquiry is objective: Did working conditions become so intolerable that a *reasonable person* in the employee's position would have felt *compelled* to resign?" *Suders*, 542 U.S. at 141 (emphasis added); see also 1 Lindemann & Grossman, *supra*, at 1438-1441 & n.71. A franchisee thus could not recover if it failed because of its own pre-existing marginality.

[25] For constructive eviction claims, "it is essential that the tenant's quiet enjoyment be disturbed by some *wrongdoing* on the part of the landlord, and a constructive eviction does not arise from an attempt by the landlord to hold the tenant to the terms of the lease." 52A C.J.S. *Landlord & Tenant* § 966, at 362 (2003) (footnote omitted) (emphasis added). Likewise, "[a] constructive discharge occurs when an employee resigns from his/her employment because (s)he is being subjected to *unlawful employment practices*." 2 *EEOC Compliance Manual* § 612.9(a) (2008) (emphasis added). A franchisee thus could not claim constructive termination under the PMPA unless the franchisor's conduct was wrongful and related to the elements making up the franchise—*i.e.*, the franchisor breached one of the three statutory elements. See J.A. 444-445; *Dersch*, 314 F.3d at 859; *Portland 76*, 153 F.3d at 948; *Clark*, 137 F.3d at 390-392; *May-Som*, 869 F.2d at 922.

The very fact that the Court would have to extrapolate so many elements of a "constructive termination" claim with no guidance from Congress is reason enough to reject the theory. Cf. *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188-189 (1994). At the very least, however, "termination" is a *sine qua non* of any claim for "constructive termination."

b. The court of appeals admitted that constructive terminations in other contexts—employment and landlord-tenant—require "an actual severance of the relationship." J.A. 446. But it refused to apply that principle here. Opining that "sunk costs, optimism, and the habit of years might lead franchisees to try to make the new arrangements work, even when the terms have changed so materially as to make success impossible," the court asserted that "requir[ing] an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable." *Id.* at 446-447.

That rationale ignores state-law remedies. While the PMPA addresses only terminations, "[s]tate laws dealing with [other] aspects of the relationship are not preempted." S. Rep. No. 95-731, at 42. Here, for example, the dealers recovered $1.3 million on breach-of-contract claims that were based on the same facts as their constructive termination claims. See p. 28, *supra*. The dealers were thus hardly required to "abandon[ ] * * * years of work and investment" to obtain meaningful relief. Besides, "sunk costs, optimism, and the habit of years" surely lead many longtime employees or tenants to "try to make the new arrangements work" as well. The First Circuit never explained why the law should require an impoverished immigrant to "move out" before claiming "constructive eviction," or a dedicated employee to "leave

the workplace" before claiming "constructive discharge," but not require the operator of a chain of service stations to stop operating one of its stations before suing for "constructive termination."

Barnes insisted that "[o]ne of Congress's purposes in adopting the [PMPA] was to protect franchisees from overbearing, burdensome conduct by the franchisor during the term of the franchise." 795 F.2d at 362-363 (citing S. Rep. No. 95-731, at 17-19). But Congress enacted the PMPA to address terminations and non-renewals, not "burdensome conduct." Even the legislative history that *Barnes* cites makes that clear. See S. Rep. No. 95-731, at 17-19. Besides, whatever Congress's purposes, it chose to advance them by restricting only terminations and non-renewals. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987).

C. The Evidence Failed To Show That Any of the Eight Dealers Was "Terminated" in This Case

Because the court of appeals applied the wrong standard, its judgment on the termination claims should be reversed. A "termination" of any sort requires an end to the franchise. Here, "no actual termination occurred." J.A. 432. At no time did Shell or Motiva inform the dealers that their franchises were being put to an end. Nor did Shell or Motiva refuse to provide any of the statutory elements of the franchise (by denying a dealer use of the premises, cutting off fuel supply, or rescinding trademark rights).

Four dealers, moreover, were still operating their Shell stations at the time of trial, almost *five years* after the elimination of the rent subsidy that allegedly "terminated" their franchises. See p. 10, *supra*. It is absurd to permit a claim for "termination" where a dealer is still a franchisee five years later, using the same premises, motor fuel, and trademark (and earning as much as $200,000 a year doing so). See p. 14, *supra*. Three other dealers continued to operate for months or years through the end of their stated franchise terms; they then signed new Motiva agreements and operated under those too. See p. 11 & n.8, *supra*. Those three dealers likewise cannot establish that their franchises were "terminate[d] * * * prior to the conclusion of the[ir] term," as the PMPA requires. 15 U.S.C. § 2802(a)(1).[26]

Only one dealer—Pisarczyk—left the service-station business before his franchise expired. But Pisarczyk had been planning to convert the station to a garden center before the subsidy ended and never claimed that his decision to leave the service-station business had anything to do with Motiva's rent policies. See p. 11, *supra*. In his case too, therefore, the complained-of conduct did not "terminate" his franchise in any sense. The judgment must accordingly be reversed.

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[26] Whether a dealer ceases operations *after* the relevant franchise agreement expires is irrelevant. The PMPA applies only to termination of the "franchise"—*i.e.*, the franchise "contract"—"prior to the conclusion of [its] term." 15 U.S.C. §§ 2801(1), 2802(a)(1). Here, seven dealers continued operating for the full terms of the agreements that were purportedly "terminated" by elimination of the rent subsidy. The subsequent Motiva agreements did not include that subsidy and thus could not have been constructively terminated by its elimination. Indeed, the dealers *disavowed* any claim for constructive termination based on the subsequent Motiva agreements. See Pltfs. C.A. Br. 40 n.29.

II. A Dealer That Signs A Renewal Agreement Cannot Claim That The Franchisor "Failed To Renew" The Franchise Relationship (No. 08-240)

Despite having allowed the dealers' "constructive termination" claims, the court of appeals rejected their parallel "constructive non-renewal" claims. That latter decision was correct. The dealers were offered and accepted renewal agreements. Motiva thus did not "fail to renew" the franchise relationships in violation of the PMPA.

A. The PMPA Does Not Permit Non-Renewal Claims Where the Franchise Relationship Is Renewed

1. In addition to addressing "terminat[ion]" during a franchise's stated term, the PMPA also addresses "fail-[ure] to renew" at the end of the term. 15 U.S.C. §2802(a). "[N]o franchisor," the Act provides, may "fail to renew any franchise relationship" except on specified grounds following prescribed notice. *Id.* §2802(a)(2). The dealer has the burden of showing "nonrenewal of the franchise relationship." *Id.* §2805(c). The Act defines "fail to renew" and "nonrenewal" as "a failure to reinstate, continue, or extend the franchise relationship * * * at the conclusion of the term, or on the expiration date, stated in the relevant franchise." *Id.* §2801(14)(A).

Those terms are unambiguous. A "failure" to do something is an "[o]mission to perform * * * an appointed function." *Webster's*, *supra*, at 910. Thus, where the franchisor actually offers a renewal agreement and the franchisee executes that agreement, the franchisor has not "fail[ed] to renew" the franchise relationship. The franchisor has not "[o]mi[tted]" to "reinstate, continue, or extend." To the contrary, because the parties execute a renewal agreement, the relationship has been extended.

Dealers may complain that a new agreement contains terms different from those in the old one. But Congress proscribed only non-renewals—not renewals on terms the dealer dislikes but nonetheless accepts. Congress "recognize[d] the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." S. Rep. No. 95-731, at 19. For that reason, the Act expressly permits "changes or additions to the provisions of the franchise" at the time of renewal, and authorizes non-renewal if a dealer "fail[s] * * * to agree." 15 U.S.C. §2802(b)(3)(A). Congress, moreover, used the broader term "franchise relationship" (rather than "franchise") in the non-renewal context to make clear that franchisors do not have to keep offering the same "franchise" (*i.e.*, the same franchise agreement) each time an agreement expires. See S. Rep. No. 95-731, at 30 (discussing 15 U.S.C. §2801(1)-(2)).

The Act does prohibit "nonrenewal" where the new terms are not proposed "in good faith and in the normal course of business" or are proposed "for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor * * * or otherwise preventing the renewal of the franchise relationship." 15 U.S.C. §2802(b)(3)(A). But those prohibitions by their terms identify circumstances where *refusing to renew* a dealer is unlawful. See *ibid.* They do not provide an independent basis for suit where the franchisor *in fact renews* the dealer. The Act provides a cause of action only for "fail[ure] to renew." *Id.* §§2802(a)(2), 2805(a). Bad motives can transform an otherwise permissible non-renewal into an unjustified one. But they cannot transform a renewal into a non-renewal where the

parties actually execute a renewal agreement extending the relationship.

The courts of appeals have thus overwhelmingly rejected claims for "non-renewal" by dealers that sign renewal agreements. In *Dersch*, the Seventh Circuit refused to permit a claim by a dealer that signed a renewal agreement "under protest." 314 F.3d at 849-851. "[T]he PMPA," the court noted, "was enacted to address one narrow, yet crucial, aspect of petroleum franchise relationships—the termination of franchises and the nonrenewal of franchise relationships." *Id.* at 859. "[B]y signing the renewal agreement, and thus renewing its statutory 'franchise,' [the dealer] divested itself of the right to bring an action under the PMPA." *Id.* at 866. Three other courts of appeals have agreed. See J.A. 450-454; *Abrams Shell*, 343 F.3d at 488-489 & n.16; *Clark*, 137 F.3d at 394-395. Only the Ninth Circuit has held otherwise, see *Pro Sales, Inc.* v. *Texaco, U.S.A.*, 792 F.2d 1394, 1398-1399 (9th Cir. 1986), and its decision has been "rejected by the other circuits," J.A. 451.

2. Recognizing a cause of action for non-renewal where a dealer accepts a renewal agreement would also flout the Act's carefully calibrated notice-and-preliminary-relief framework for resolving renewal disputes. Where a franchisor and a dealer are unable to agree on renewal terms, the franchisor can refuse to renew the dealer. 15 U.S.C. §2802(b)(3)(A). But the franchisor must provide notice of non-renewal "not less than 90 days prior to the date on which such * * * nonrenewal takes effect." *Id.* §2804(a)(2). Once the dealer receives notice, it can invoke the Act's private cause of action and demand a preliminary injunction maintaining the status quo while a court determines the lawfulness of the proposed terms. *Id.* §2805(a), (b)(2). The Act thus creates a com-

prehensive mechanism that (1) requires franchisors to notify dealers of their intent not to renew well in advance; and (2) provides aggrieved franchisees a 90-day period in which to seek relief before the non-renewal takes effect.

As this Court has explained, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001); see also *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19-20 (1979). That canon has particular force where, as here, Congress enacts a "'precisely drawn, detailed statute.'" *EC Term of Years Trust* v. *United States*, 550 U.S. 429, 433 (2007). By creating an elaborate notice-and-preliminary-relief mechanism to govern renewal disputes under the PMPA, "Congress clearly indicated the means by which it would protect franchisees." *Dersch*, 314 F.3d at 865.

That comprehensive notice-and-preliminary-injunction structure would be frustrated if franchisees could simply sign objectionable renewal agreements, continue to operate under them, and then sue for damages under a "constructive non-renewal" theory. Congress specifically authorized franchisors to propose new or different terms in renewal agreements, subject only to limited exceptions. 15 U.S.C. §2802(b)(3)(A). It did so because it "recognize[d] the importance of providing adequate flexibility * * * to respond to changing market conditions and consumer preferences." S. Rep. No. 95-731, at 19. Allowing "non-renewal" claims by franchisees who actually sign renewal agreements converts the exercise of that intended flexibility into a perilous venture. Any time franchisors proposed new terms, dealers could sign the new agreements and reap the benefits thereof while speculat-

ing on potential damages claims. And franchisors could confront liability for non-renewal in a suit filed well into the term of the franchise, even though both parties agreed to the contract.

B. The Rationales for Recognizing Constructive Non-Renewal Claims Lack Merit

That same notice-and-preliminary-relief structure also refutes the Ninth Circuit's rationale for allowing non-renewal claims by dealers that sign renewal agreements. *Pro Sales* rested its ruling on legislative history that mentioned "*threats* of nonrenewal as well as nonrenewals themselves." 792 F.2d at 1399 (citing S. Rep. No. 95-731, at 18). Congress, however, fully addressed any concerns about "threatened" non-renewals by requiring franchisors to provide 90 days' notice of any non-renewal. See 15 U.S.C. §2804(a). As the Seventh Circuit recognized, "'[b]ecause a franchisor cannot [fail to renew] without providing the requisite notice, threats of [non-renewal] unaccompanied by explicit notice pursuant to §2804 have no teeth.'" *Dersch*, 314 F.3d at 863. Once the franchisor issues the notice, the dealer has ample time to seek preliminary relief. Given that explicit structure, constructive non-renewal claims are not necessary to redress "threatened" non-renewals.

Nor is there any merit to the Ninth Circuit's suggestion that, absent constructive non-renewal claims, dealers would be forced to "go out of business before invoking the protections of the PMPA." *Pro Sales*, 792 F.2d at 1399. That contention "completely disregards the statutory protection afforded to franchisees" by the notice-and-preliminary-relief framework. *Dersch*, 314 F.3d at 865. Franchisees that receive a notice of non-renewal following a dispute over renewal terms can challenge the terms in court *before* the non-renewal takes effect. And

because the Act substantially relaxes the standard for injunctive relief, see 15 U.S.C. §2805(b)(2), dealers with anything approaching a meritorious claim can obtain an injunction maintaining the status quo as a matter of course. See *Dersch*, 314 F.3d at 865.

Finally, plaintiffs have argued that they may pursue a "constructive non-renewal" claim because they signed the renewal agreements "under protest" and thereby "reserve[d] [their] right[ ]" to sue. Pet. in No. 08-240, at 24-26. There are circumstances where acting "under protest" can avoid a waiver of rights—for example, paying an unlawful tax or accepting defective performance on a contract. See, *e.g.*, U.C.C. §1-207(1). But that principle is beside the point here. Plaintiffs did not have a valid claim under the PMPA that they waived by renewing their agreements. The PMPA simply provides no claim at all except in the two contexts Congress addressed—termination and non-renewal. Absent a non-renewal, a dealer simply has no "right" to sue under the PMPA at all. See 15 U.S.C. §§2802(a)(2), 2805(a). Where a "right" never comes into existence, there is nothing to "reserve" by signing under protest.

C. Motiva Did Not "Fail To Renew" Any of the Eight Dealers

As the court of appeals recognized, J.A. 450-454, the statute, properly construed, forecloses the non-renewal claims of all eight dealers in this case. Seven of the dealers were presented with renewal agreements based on the new rent formula that, in their view, amounted to a "constructive non-renewal" of their franchise relationships. The dealers signed those renewal agreements. See p. 11 & nn.7-8, *supra*. Because those dealers' franchise relationships were renewed, Motiva could not have "failed to renew" them in violation of the PMPA. The

eighth dealer, Pisarczyk, left the service-station business for unrelated reasons five months before his franchise agreement expired, leaving no occasion for renewal. See p. 11, *supra*. The court of appeals thus properly reversed.

CONCLUSION

The judgment of the court of appeals should be reversed with respect to the termination claims (No. 08-372) and affirmed with respect to the non-renewal claims (No. 08-240).

Respectfully submitted.

PAUL D. SANSON
VAUGHAN FINN
KAREN T. STAIB
SHIPMAN & GOODWIN LLP
One Constitution Plaza
Hartford, CT 06103
(860) 251-5000

JAMES COWAN
SENIOR COUNSEL
SHELL OIL COMPANY
P.O. Box 2463
Houston, TX 77252-2463
(713) 241-4039

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

MACEY REASONER STOKES
DAVID M. RODI
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995
(713) 229-1234

Counsel for Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company

AUGUST 2009

APPENDIX

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RELEVANT STATUTORY PROVISIONS

Title I of the Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322, 322 (1978), as amended in 1994 and 2007 and codified at 15 U.S.C. §§2801-2807, provides as follows:

§ 2801. Definitions

As used in this subchapter:

(1)(A) The term "franchise" means any contract—

(i) between a refiner and a distributor,

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer,

under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes—

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed—

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(iii) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who—

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include—

(A) any failure which is only technical or unimportant to the franchise relationship;

(B) any failure for a cause beyond the reasonable control of the franchisee; or

(C) any failure based on a provision of the franchise which is illegal or unenforceable under the law of any State (or subdivision thereof).

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship—

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after June 19, 1978) of the relevant franchise which was entered into prior to June 19, 1978, and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or a standard metropolitan statistical area as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce—

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

§ 2802. Franchise relationship

(a) General prohibition against termination or nonrenewal

Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may—

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b) Precondition and grounds for termination or nonrenewal

(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if—

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if—

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which

termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if—

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise;

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 2804(d) of this title; and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise entered into or renewed on or after such date (the term

of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if—

(i) such determination—

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises—

(I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other

person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if—

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for the benefit of the franchisor or otherwise preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if—

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any em-

ployee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to June 19, 1978, (the unexpired term of which, on such date, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if—

(i) such determination is—

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or

agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either—

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

(c) Definition

As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as—

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if—

(A) the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise—

(i) of the duration of the underlying lease; and

(ii) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(B) during the 90-day period after notification was given pursuant to section 2804 of this title, the franchisor offers to assign to the franchisee any option to extend the underlying lease or option to purchase the marketing premises that is held by the franchisor, except that the franchisor may condition the assignment upon receipt by the franchisor of—

(i) an unconditional release executed by both the landowner and the franchisee releasing the franchisor from any and all liability accruing after the date of the assignment for—

(I) financial obligations under the option (or the resulting extended lease or purchase agreement);

(II) environmental contamination to (or originating from) the marketing premises; or

(III) the operation or condition of the marketing premises; and

(ii) an instrument executed by both the landowner and the franchisee that ensures the franchisor and the contractors of the franchisor reasonable access to the marketing premises for the purpose of testing for and remediating any environmental contamination that may be present at the premises; and

(C) in a situation in which the franchisee acquires possession of the leased marketing premises effective immediately after the loss of the right of the franchisor to grant possession (through an assignment pursuant to subparagraph (B) or by obtaining a new lease or purchasing the marketing premises from the landowner), the franchisor (if requested in writing by the franchisee not later than 30 days after notification was given pursuant to section 2804 of this title), during the 90-day period after notification was given pursuant to section 2804 of this title—

(i) made a bona fide offer to sell, transfer, or assign to the franchisee the interest of the franchisor in any improvements or equipment located on the premises; or

(ii) if applicable, offered the franchisee a right of first refusal (for at least 45 days) of an offer, made by another person, to purchase the interest of the franchisor in the improvements and equipment.

(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) failure by the franchisee to operate the marketing premises for—

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

(d) Compensation, etc., for franchisee upon condemnation or destruction of marketing premises

In the case of any termination of a franchise (entered into or renewed on or after June 19, 1978), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or renewed)—

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5) of this section, the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) of this

section and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

§ 2803. Trial and interim franchises

(a) Nonapplicability of statutory nonrenewal provisions

The provisions of section 2802 of this title shall not apply to the nonrenewal of any franchise relationship—

(1) under a trial franchise; or

(2) under an interim franchise.

(b) Definitions

For purposes of this section—

(1) The term "trial franchise" means any franchise—

(A) which is entered into on or after June 19, 1978;

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously—

(i) that the franchise is a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of

the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 2804 of this title, of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 2802 of this title, limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent authorized by the provisions of the franchise or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise—

(A) which is entered into on or after June 19, 1978;

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal—

(i) was based upon a determination described in section 2802(b)(2)(E) of this title, and

(ii) the requirements of section 2802(b)(2)(E) of this title were satisfied; and

(D) which is in writing and states clearly and conspicuously—

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located if the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

(c) Nonrenewal upon meeting statutory notification requirements

If the notification requirements of section 2804 of this title are met, any franchisor may fail to renew any franchise relationship—

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if—

(A) such nonrenewal is based upon a determination described in section 2802(b)(2)(E) of this title; and

(B) the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

§ 2804. Notification of termination or nonrenewal of franchise relationship

(a) General requirements applicable to franchisor

Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship—

(1) in the manner described in subsection (c) of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

(b) Additional requirements applicable to franchisor

(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section—

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor—

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins—

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 2802(b)(2)(E) of this title or section 2803(c)(2) of this title, the franchisor shall—

(A) furnish notification to the franchisee not less than 180 days prior to the date on which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

(c) Manner and form of notification

Notification under this section—

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain—

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

(d) Preparation, publication, etc., of statutory summaries

(1) Not later than 30 days after June 19, 1978, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this subchapter, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this subchapter.

(2) In the case of summaries required to be furnished under the provisions of section 2802(b)(2)(D) of this title or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

§ 2805. Enforcement provisions

(a) Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

If a franchisor fails to comply with the requirements of section 2802, 2803, or 2807 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of—

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802, 2803, or 2807 of this title.

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802, 2803, or 2807 of this title, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

(2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if—

(A) the franchisee shows—

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) of this section to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a) of this section, the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced—

(A) more than 90 days after the date on which notification pursuant to section 2804(a) of this title was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 2804(b)(2) of this title was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 2804(b)(1) of this title.

(c) Burden of proof; burden of going forward with evidence

In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b), 2803, or 2807 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

(d) Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled—

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802, 2803, or 2807 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

(e) Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that—

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business—

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this title.

(f) Release or waiver of rights

(1) No franchisor shall require, as a condition of entering into or renewing the franchise relationship, a franchisee to release or waive—

(A) any right that the franchisee has under this subchapter or other Federal law; or

(B) any right that the franchisee may have under any valid and applicable State law.

(2) No provision of any franchise shall be valid or enforceable if the provision specifies that the interpretation or enforcement of the franchise shall be governed by the law of any State other than the State in which the franchisee has the principal place of business of the franchisee.

§ 2806. Relationship of statutory provisions to State and local laws

(a) Termination or nonrenewal of franchise

(1) To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such fran-

chise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

(2) No State or political subdivision of a State may adopt, enforce, or continue in effect any provision of law (including a regulation) that requires a payment for the goodwill of a franchisee on the termination of a franchise or nonrenewal of a franchise relationship authorized by this subchapter.

(b) Transfer or assignment of franchise

(1) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) Nothing in this subchapter shall prohibit any State from specifying the terms and conditions under which any franchise or franchise relationship may be transferred to the designated successor of a franchisee upon the death of the franchisee.

§ 2807. Prohibition on restriction of installation of renewable fuel pumps

(a) Definition

In this section:

(1) Renewable fuel

The term "renewable fuel" means any fuel—

(A) at least 85 percent of the volume of which consists of ethanol; or

(B) any mixture of biodiesel and diesel or renewable diesel (as defined in regulations adopted pursuant to section 7545(o) of Title 42 (40 CFR, part 80)), determined without regard to any use of kerosene and containing at least 20 percent biodiesel or renewable diesel.

(2) Franchise-related document

The term "franchise-related document" means—

(A) a franchise under this chapter; and

(B) any other contract or directive of a franchisor relating to terms or conditions of the sale of fuel by a franchisee.

(b) Prohibitions

(1) In general

No franchise-related document entered into or renewed on or after December 19, 2007, shall contain any provision allowing a franchisor to restrict the franchisee or any affiliate of the franchisee from—

(A) installing on the marketing premises of the franchisee a renewable fuel pump or tank, except that the franchisee's franchisor may restrict the installation of a tank on leased marketing premises of such franchisor;

(B) converting an existing tank or pump on the marketing premises of the franchisee for renewable fuel use, so long as such tank or pump and the piping connecting them are either warranted by the manufacturer or certified by a recognized standards setting organization to be suitable for use with such renewable fuel;

(C) advertising (including through the use of signage) the sale of any renewable fuel;

(D) selling renewable fuel in any specified area on the marketing premises of the franchisee (including any area in which a name or logo of a franchisor or any other entity appears);

(E) purchasing renewable fuel from sources other than the franchisor if the franchisor does not offer its own renewable fuel for sale by the franchisee;

(F) listing renewable fuel availability or prices, including on service station signs, fuel dispensers, or light poles; or

(G) allowing for payment of renewable fuel with a credit card,

so long as such activities described in subparagraphs (A) through (G) do not constitute mislabeling, misbranding, willful adulteration, or other trademark violations by the franchisee.

(2) Effect of provision

Nothing in this section shall be construed to preclude a franchisor from requiring the franchisee to obtain reasonable indemnification and insurance policies.

(c) Exception to 3-grade requirement

No franchise-related document that requires that 3 grades of gasoline be sold by the applicable franchisee shall prevent the franchisee from selling a renewable fuel in lieu of 1, and only 1, grade of gasoline.